Re Malaya bin Sibuku; ex parte Kaya Karisma Sdn Bhd

HIGH COURT (KOTA KINABALU) — BANKRUPTCY MATTER NO BKI-29NCC-511/6 OF 2020
LEONARD SHIM JC
11 JANUARY 2020

Bankruptcy — Proceedings — Application for leave — Leave to commence bankruptcy action/proceedings against debtor allowed — Appeal against decision — Whether creditor exhausted all modes of execution against debtor as required under s 5(4) read with s 5(6) of Insolvency Act 1967 — Insolvency Act 1967 s 5(4) & (6)

This was an appeal by the judgment debtor against the decision of the senior assistant registrar in allowing the judgment creditor's summons in chambers ('encl 1') that leave be granted to the creditor to commence bankruptcy action/proceedings against the debtor with costs. The debtor acted as a guarantor for the debts incurred by the principal debtor, Dunggon Jaya Sdn Bhd ('Dunggon Jaya') pursuant to a director's guarantee and indemnity. The creditor obtained a judgment against Dunggon Jaya as the first defendant, Elvis Maidin Ebrahim ('Elvis') as the second defendant and the debtor as the third defendant ('the judgment'). Under the judgment, Dunggon Jaya was adjudged to owe the creditor RM2,808,221.75 together with interests and costs. Elvis and the debtor were adjudged to be liable as guarantors. After the judgment, Elvis was declared a bankrupt. The creditor further had taken winding up proceedings against Dunggon Jaya and had obtained a winding up order. Both the judgment and the winding up order had not been stayed. It was submitted by the debtor that the learned senior assistant registrar had erred in fact and in law to hold that once a winding up order had been pronounced, the mode of enforcement and execution was exhausted. According to the debtor, it was only exhausted when the company was dissolved. Further, it was contended that the debtor was rich in assets and the debtor believe that its asset after liquidation were adequate to meet the debts owed to its creditors. The debtor further contended that there was an outstanding claim by Dunggon Jaya against Aeropod Sdn Bhd ('Aeropod') for wrongful termination as the main contractor of the Aeropod project and the claim was pending arbitration. The main issue for consideration was whether the creditor had exhausted all modes of execution against the debtor as required under s 5(4) read with s 5(6) of the Insolvency Act 1967.

Held, dismissing the appeal with costs:

(1) If the Legislature intended that the liquidation of the principal borrower company must be 'completed' and that the company was 'dissolved' before leave could be granted under s 5(4) of the Insolvency Act 1967, one would expect Parliament to have spelt out that requirement in an express and clear provision to that effect. Section 5(3) to (6) of the Insolvency Act 1967 was clear and unambiguous. It did not contain any express provision that require such 'completion' of liquidation or 'dissolution' of the company before leave may be granted under s 5(4) of the Insolvency Act 1967. This protection for the guarantor was to remedy the mischief of judgment creditors proceeding against the guarantor directly in bankruptcy instead of executing against the principal debtor. The principal debtor, Dunggon Jaya had been wound up and the co guarantor or judgment debtor had been declared a bankrupt. The creditor did not proceed directly against the guarantor (debtor) in bankruptcy to enforce the said judgment. Therefore, the creditor had exhausted all modes of execution against Dunggon Jaya and Elvis and the requirement for leave under s 5(4) of the Insolvency Act 1967 was satisfied (see paras 31–33).

(2) There was no evidence or report from the liquidator of Dunggon Jaya in the affidavit in opposition showing the total debts of Dunggon Jaya and the value of its purported assets and whether the purported assets and the claim against Aeropod would be sufficient to meet the debts owed to its creditors. Further, the arbitration proceeding against Aeropod was not related to the creditor or the debt owed by Dunggon Jaya to the creditor and had no bearing on encl 1. Thus, there were no grounds to interfere with the exercise of the discretion by the learned senior assistant registrar in allowing encl 1 (see paras 35, 37 & 39).

[Bahasa Malaysia summary

Ini adalah rayuan oleh penghutang penghakiman terhadap keputusan penolong kanan pendaftar yang membenarkan penghakiman saman dalam kamar pemiutang ('lampiran 1') bahawa kebenaran diberikan kepada pemiutang untuk memulakan tindakan/prosiding kebankrapan terhadap penghutang dengan kos. Penghutang bertindak sebagai penjamin bagi hutang yang ditanggung oleh penghutang utama, Dunggon Jaya Sdn Bhd ('Dunggon Jaya') berdasarkan jaminan dan indemniti pengarah. Pemiutang mendapat penghakiman terhadap Dunggon Jaya sebagai defendan pertama, Elvis Maidin Ebrahim ('Elvis') sebagai defendan kedua dan penghutang sebagai defendan ketiga ('penghakiman'). Di bawah penghakiman itu, Dunggon Jaya dihakimi berhutang kepada pemiutang sebanyak RM2,808,221,75 beserta faedah dan kos. Elvis dan penghutang dihakimi sebagai penjamin. Selepas penghakiman, Elvis diisytiharkan muflis. Pemiutang selanjutnya telah mengambil prosiding penggulungan terhadap Dunggon Jaya dan telah mendapat perintah penggulungan. Kedua keputusan dan perintah penggulungan tidak

ditangguhkan. Dihujahkan oleh penghutang bahawa penolong kanan pendaftar yang bijaksana telah terkhilaf dalam fakta dan dalam undang-undang untuk memutuskan bahawa setelah perintah penggulungan diputuskan, cara penguatkuasaan dan pelaksanaannya telah dijalankan. Menurut penghutang, ia hanya dijalankan ketika syarikat itu dibubarkan. Selanjutnya, dikatakan bahawa penghutang kaya dengan aset dan penghutang percaya bahawa asetnya setelah pembubaran mencukupi untuk memenuhi hutang yang dihutang kepada pemiutang. Penghutang selanjutnya berpendapat bahawa terdapat tuntutan tertunggak oleh Dunggon Jaya terhadap Aeropod Sdn Bhd ('Aeropod') kerana penamatan yang salah sebagai kontraktor utama projek Aeropod dan tuntutan tersebut menunggu keputusan timbang tara. Isu utama untuk pertimbangan adalah sama ada pemiutang telah menjalankan semua kaedah pelaksanaan terhadap penghutang seperti yang dikehendaki di bawah s 5(4) dibaca dengan s 5(6) Akta Insolvensi 1967.

Diputuskan, menolak rayuan dengan kos:

(1) Jika badan perundangan bermaksud bahawa penggulungan syarikat peminjam utama harus 'diselesaikan' dan syarikat itu 'dibubarkan' sebelum kebenaran dapat diberikan berdasarkan s 5(4) Akta Insolvensi 1967, seseorang akan menjangkakan Parlimen telah menyatakan keperluan itu dalam peruntukan yang jelas dan nyata untuk itu. Seksyen 5(3) hingga (6) Akta Insolvensi 1967 adalah jelas dan nyata. Ia tidak mengandungi peruntukan yang tegas yang memerlukan 'penyelesaian' penggulungan atau 'pembubaran' syarikat tersebut sebelum kebenaran boleh diberikan di bawah s 5(4) Akta Insolvensi 1967. Perlindungan ini bagi penjamin adalah untuk meremedikan kerosakan pemiutang penghakiman meneruskan prosiding kebankrapan terhadap penjamin secara langsung dan bukannya penghutang utama. Penghutang utama, Dunggon Jaya telah digulungkan dan penjamin bersama atau penghutang penghakiman telah diisytiharkan muflis. Pemiutang tidak melakukan tindakan langsung terhadap penjamin (penghutang) dalam kebankrapan untuk menguatkuasakan keputusan tersebut. Oleh itu, pemiutang telah menjalankan semua cara pelaksanaan terhadap Dunggon Jaya dan Elvis dan syarat untuk kebenaran di bawah s 5(4) Akta Insolvensi 1967 telah dipenuhi (lihat perenggan 31–33).

(2) Tidak ada bukti atau laporan daripada pelikuidasi Dunggon Jaya dalam afidavit menentang yang menunjukkan jumlah hutang Dunggon Jaya dan nilai asetnya dan sama ada aset yang dinyatakan dan tuntutan terhadap Aeropod akan mencukupi untuk memenuhi hutang kepada pemiutang. Selanjutnya, proses timbang tara terhadap Aeropod tidak berkaitan dengan pemiutang atau hutang yang dihutang oleh Dunggon Jaya kepada pemiutang dan tidak mempunyai kaitan dengan lampiran 1. Oleh itu, tidak ada alasan untuk mengganggu pelaksanaan budi bicara oleh penolong kanan pendaftar yang bijaksana dalam membenarkan

A lampiran 1 (lihat perenggan 35, 37 & 39).]

Cases referred to

Hong Leong Bank Bhd v Ong Moon Huat and another appeal [2018] MLJU 1576; [2018] 1 LNS 1612, CA (folld)

B *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302; [2016] 7 CLJ 335, FC (folld)

Lim Sow Hoon lwn Ex parte: Malayan Banking Bhd, Per [2018] MLJU 1543; [2018] 1 LNS 1611, HC (folld)

C *Tan Tiang Lai v KKRMC Trading Sdn Bhd* [2020] MLJU 954; [2020] 1 LNS 852, HC (refd)

Tan Bon Kiat v Malayan Banking Berhad, Re [2019] MLJU 1254; [2019] 1 LNS 1583, HC (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30; [1996] 1 CLJ 241, FC (refd)

D *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; [1994] 2 CLJ 716, SC (refd)

Legislation referred to

E Companies Act 2016 ss 471, 472(3), 483
Insolvency Act 1967 s 5, 5(3), (4), (5), (6)

Kevin Wong (Baldev Gan & Assoc) for the judgment debtor.
Azimi Yahya (Chee & Co) for the judgment creditor.

F

Leonard Shim JC:

[1] This is an appeal by the judgment debtor against the decision of the senior assistant registrar dated 28 August 2020 allowing the judgment G creditor's summons in chambers dated 2 June 2020 (encl 1) that leave be granted to the creditor to commence bankruptcy action/proceedings against the debtor with costs.

BRIEF FACTS

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[2] In this case, the debtor acted as a guarantor for the debts incurred by the principal debtor, Dunggon Jaya Sdn Bhd ('Dunggon Jaya') pursuant to a director's guarantee and indemnity dated 19 October 2012. A copy of the director's guarantee and indemnity is at exh 'VC2' of the creditor's AIS.

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[3] On 18 March 2019, the creditor obtained a judgment against Dunggon Jaya (as the first defendant and principal debtor), Elvis Maidin Ebrahim (as the second defendant) and the debtor (as the third defendant) ('the judgment'). A copy of the judgment is at exh 'VC1' of the creditor's AIS.

[4] Under the judgment, Dunggon Jaya was adjudged to owe the creditor RM2,808,221.75 together with interest and costs. Elvis Maidin Ebrahim and the debtor were adjudged to be liable as guarantors. A

[5] After the aforesaid judgment, Elvis Maidin Ebrahim was declared bankrupt on 26 March 2019. A copy of the receiving order on creditor's petition and adjudication order are at exh 'VC3(a)' and 'VC3(b)' of the creditor's AIS. B

[6] Further, the creditor had taken winding up proceedings against Dunggon Jaya based on the judgment and had obtained a winding up order on 23 September 2019. A copy of the order for winding up is at exh 'VC4' of the creditor's AIS. C

[7] As it stands, both the judgment and the winding up order have not been stayed. D

[8] It is settled law that an appeal from a decision of the senior assistant registrar to a High Court judge in chambers is by way of an actual rehearing and the judge must treat the matter as though it came before him for the first time. See *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241 and *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; [1994] 2 CLJ 716. E

CONTENTION OF THE PARTIES F

[9] The learned counsel for the judgment submitted that s 5(4) and 5(6) of the Insolvency Act 1967 provides that:

> (4) Before granting leave referred to in paragraph (3)(b), the court shall satisfy itself that the petitioning creditor has *exhausted all modes of execution and enforcement to recover debts* owed to him by the debtor. G
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> (6) For the purposes of subsection (4), modes of execution and enforcement include seizure and sale, judgment debtor summon, garnishment and *bankruptcy or winding up proceedings against the borrower.* H

[10] The Federal Court speaking through Hasan Lah FCJ in *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302; [2016] 7 CLJ 335, had succinctly summarised the purpose of introducing the leave requirement under the new insolvency regime: I

> The purpose of having s 5(3) of the Act which was inserted by Act A1197 is *to protect the social guarantor.* There are cases where the *creditors have been taking the easiest and shortest way out* by claiming the defaulted loans from the guarantors directly without making serious effort to get the payments from the principal borrowers. This

provision will therefore protect these guarantors from being adjudged bankrupt easily ...

[11] The Court of Appeal in *Hong Leong Bank Bhd v Ong Moon Huat and another appeal* [2018] MLJU 1576; [2018] 1 LNS 1612, Nallini Pathmanathan FCJ echoed the same sentiments:

> A *purposive construction* of the section as a whole discloses that the section seeks to introduce *protection for the guarantor* against whom bankruptcy proceedings are to be brought. The protection comes in the form of ensuring that enforcement has been exhausted in respect of the principal debtor prior to proceeding against the guarantor. It is *to remedy the mischief* of judgment creditors *proceeding* against the guarantors directly in bankruptcy rather than executing and enforcing against the principal debtor ...
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> It follows therefore that in construing s 5(4) regard must be given to s 5(6). And s 5(6) provides that the modes of execution and enforcement that must be exhausted include seizure and sale, judgment debtor summons, garnishment and bankruptcy against the borrower.

[12] In this regard, it was submitted by the debtor that the learned senior assistant registrar erred in fact and in law to hold that once a winding up order has been pronounced, the mode of enforcement and execution is exhausted. Put shortly, it is only exhausted when the company is dissolved.

[13] The learned counsel for the debtor referred to Professor Andrew Keay and Dr Peter Walton in the third edition of *Insolvency Law — Corporate and Personal* wherein at p 233, first paragraph, the learned authors explained that:

> The end of a company comes *when it is dissolved.* Liquidation is the process that prepares a company for dissolution. Winding up does not consist of an order that a company be wound up; rather it means the process whereby *the assets of a company are collected and realised,* the resulting proceeds are applied in *discharging all its debts and liabilities and any balance which remains ... are distributed among the members* according to their rights and interest ...

[14] Further and/or in the alternative, it was submitted by the learned counsel for the debtor that there is an outstanding claim by Dunggon Jaya in the sum of more than RM10m against Aeropod Sdn Bhd for wrongful termination, whereby Dunggon Jaya was appointed as the main contractor in respect of the Aeropod Project.

[15] Dunggon Jaya has instituted arbitration proceedings and is currently in the midst of setting down the matter for hearing before the learned arbitrator at Kuala Lumpur.

[16] It was submitted by the debtor that there is every possibility that at the conclusion of the dissolution of the principal debtor company, there would be enough liquidated assets to cover the debts of the judgment creditor

[17] The learned counsel for the creditor contended that once the principal debtor has been wound up, the creditor has no further options of execution as specified under s 5(6) of the Insolvency Act 1967. This is reinforced by s 471 of the Companies Act 2016 which provides that once a company is wound-up, there is no right to take action against it without leave of the court. Therefore, execution options such as seizure and sale and garnishment proceedings are no longer exercisable.

[18] It was submitted that the creditor has exhausted all execution proceedings against the principal debtor (see para 7 of the creditor's AIS and para 5 of the creditor's AIR). The creditor submitted that this shows the court that the creditor has satisfied the conditions under s 5 of the Insolvency Act 1967 and they submitted that leave should be granted.

[19] The matters raised in the debtor's AIO to oppose the SIC are matters that have been addressed at the winding up proceedings and were decided in favour of the creditor (see paras 4–6 of the creditor's AIR and exh 'VC5' thereto). They are therefore issues that are not relevant to this SIC as this application only concerns whether the creditor has exhausted its options for recovery against the principal debtor.

[20] Further, the creditor submitted that the debtor's co-guarantor and second defendant in the judgment dated 18 March 2019 (Elvis Maidin Ebrahim) has been declared bankrupt and there are no further options for recovery against him. It is therefore obvious that the creditor, who remains unpaid to the tune of over RM2.8m, has no choice but to seek bankruptcy against the debtor as the guarantor. It must be reminded here that the debtor is not a social guarantor. He acted in his capacity as Director of Dunggon Jaya and entered the guarantee in pursuance of a business transaction.

EVALUATION AND FINDINGS OF THE COURT

[21] The main issue before the learned senior assistant registrar is whether the creditor has exhausted all modes of execution against the debtor as required under s 5(4) read with s 5(6) of the Insolvency Act 1967.

[22] In the present case, it is not disputed that a winding up order has been made against the principal debtor, Dunggon Jaya Sdn Bhd on 23 September 2019 and the winding up order has not been stayed (the winding up order).

[23] In *Per: Lim Sow Hoon lwn Ex parte: Malayan Banking Bhd* [2018] MLJU 1543; [2018] 1 LNS 1611, the High Court held:

> [22] Penggubal undang-undang juga telah memasukkan tindakan terakhir terhadap peminjam sebagai salah satu keperluan yang perlu dipatuhi sebagaimana diperuntukkan dalam subseksyen (6). Saya berpendapat ayat 'and bankruptcy or winding up proceedings against the borrower' hendaklah dibaca berasingan dari ayat sebelumnya di mana ayat ini hanya terpakai terhadap peminjam dan ayat sebelumnya adalah terpakai terhadap penjamin. *Apabila tindakan penggulungan dan kebankrapan telah diambil terhadap peminjam, tiada tindakan penguatkuasaan lain boleh diambil kerana aset syarikat yang digulungkan dan individu yang dibankrapkan adalah terletak kepada pelikuidasi.* Oleh itu adalah munasabah undang-undang memperuntukkan bahawa tindakan kebankrapan hanya boleh diambil terhadap penjamin selepas mod penguatkuasaan lain telah diambil terhadap penjamin dan tindakan penggulungan atau kebankrapan telah diambil terhadap peminjam.
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> [23] Sebagai kesimpulan berdasarkan di atas, saya berpendapat bahawa sebelum memberikan kebenaran di bawah subseksyen (3) dan untuk mematuhi subseksyen (4) tersebut, Mahkamah hendaklah berpuashati bahawa;
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> (i) pemiutang penghakiman telah mencuba segala mod pelaksanaan dan penguatkuasaan lain terhadap penjamin/penghutang (debtor) tersebut yang termasuklah writ penyitaan dan penjualan, saman penghutang penghakiman (judgment debtor summon) dan garnisi; dan
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> (ii) *peminjam (borrower) telahpun dibankrapkan (sekiranya individu) atau digulungkan (sekiranya syarikat).*

[24] Under s 483 of the Companies Act 2016, when a liquidator is appointed, the company's property shall be vested in and under the control of the liquidator.

[25] Pursuant to s 472(3) of the Companies Act 2016, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the presentation of the winding up petition shall be void.

[26] Further, any attempt by the judgment creditor to recover the debt due against Dunggon Jaya, which has been wound up would be prohibited by the laws against undue preference under s 528 of the Companies Act 2016.

[27] As the principal debtor, Dunggon Jaya has been wound up under the winding up order dated 23 September 2019, the judgment creditor is prohibited from commencing and/or proceeding with all mode of execution and/or enforcement proceedings against Dunggon Jaya.

[28] Further, the co-defendant/ judgment debtor, Mr Elvis Maidin Ebrahim (Elvis) has also been declared bankrupt on 26 March 2019 and the bankruptcy order is still subsisting. A

[29] In *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302; [2016] 7 CLJ 335, the hirer (principal debtor) has been adjudged a bankrupt and the Federal Court held that the appellant had proved that it had exhausted all avenues to recover the debts owed to it. B

[30] In *Hong Leong Bank Bhd v Ong Moon Huat and another appeal*, the Court of Appeal in allowing the appeal and granting leave to the creditor, did not hold that the creditor was required to wait until the liquidation of the principal debtor's company assets had been realised or completed before the creditor could proceed with bankruptcy proceedings against the guarantor. C

[31] If the Legislature intended that the liquidation of the principal borrower company must be 'completed' and that the company is 'dissolved' before leave could be granted under s 5(4) of the Insolvency Act 1967, one would expect Parliament to have spelt out that requirement in an express and clear provision to that effect. See *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302; [2016] 7 CLJ 335 (FC). D E

[32] Section 5(3)–(6) of the Insolvency Act 1967 is clear and unambiguous. It does not contain any express provision that require such 'completion' of liquidation or 'dissolution' of the company before leave may be granted under s 5(4) of the Insolvency Act 1967. This protection for the guarantor is to remedy the mischief of judgment creditors proceeding against the guarantor directly in bankruptcy instead of executing against the principal debtor. F

[33] In the present case, the principal debtor, Dunggon Jaya has been wound up and the co guarantor or judgment debtor has been declared a bankrupt in 2019. The creditor did not proceed directly against the guarantor (debtor) in bankruptcy to enforce the said judgment. Applying the principles enunciated in the aforesaid authorities and from the evidence in the affidavit in support (encl 2), this court finds that the creditor has exhausted all modes of execution against Dunggon Jaya and Elvis and the requirement for leave under s 5(4) of the Insolvency Act 1967 is satisfied. G H

[34] The above finding would suffice to determine the appeal in the creditor's favour. However, this court will now consider the other issues raised by the debtor. It was contended that the debtor is rich in assets and the debtor believe that its asset after liquidation are adequate to meet the debts owed to its creditors. The debtor further contended that there is an outstanding claim by Dunggon Jaya against Aeropod Sdn Bhd in the sum of more than RM10m for I

wrongful termination as the main contractor of the Aeropod project and the claim is pending arbitration at Kuala Lumpur.

[35] There is no evidence or report from the liquidator of Dunggon Jaya in the affidavit in opposition showing the total debts of Dunggon Jaya and the value of its purported assets and whether the purported assets and the claim against Aeropod will be sufficient to meet the debts owed to its creditors. As these contentions by the debtor are mere assertions made without cogent supporting evidence, this court is inclined to agree with the learned senior assistant registrar that 'If it is true that Dunggon Jaya is indeed rich in assets, it would not in the first place be wound up by the Court'. See *Tan Tiang Lai v KKRMC Trading Sdn Bhd* [2020] MLJU 954; [2020] 1 LNS 852.

[36] Further, the issue concerning the said arbitration proceeding against Aeropod was raised in the winding up proceedings against Dunggon Jaya and was dismissed by the winding up court.

[37] Therefore, this court is inclined to agree with the learned counsel for the creditor that the said arbitration is not related to the creditor or the debt owed by Dunggon Jaya to the creditor and has no bearing on the summons in chambers (encl 1).

[38] If the debtor is genuine in his contention that Dunggon Jaya's assets are sufficient to meet the debts owed to its creditors, the debtor who is a director of Dunggon Jaya should request and ensure that the liquidator of Dunggon Jaya realise the alleged assets and lawfully settle the debts owing to the creditors before any act of bankruptcy is committed or any creditors petition is presented against the debtor. See *Re Tan Bon Kiat v Malayan Banking Berhad* [2019] MLJU 1254; [2019] 1 LNS 1583 and *Tan Tiang Lai v KKRMC Trading Sdn Bhd* [2020] MLJU 954; [2020] 1 LNS 852.

[39] Based on the aforesaid reasons, this court finds that there are no grounds to interfere with the exercise of the discretion by the learned senior assistant registrar in allowing encl 1.

[40] Hence, the decision of the learned senior assistant registrar made on 28 August 2020 is affirmed and this appeal (encl 18) is dismissed with costs in the sum of RM3,000 to be paid by the debtor to the creditor subject to payment of allocatur.

Appeal dismissed with costs.

Reported by Nabilah Syahida Abdullah Salleh